MALAYSIAN REPORTS

THE S.S. "HWA LUNG"; MAHAWANGSA HOLDINGS SDN. BHD. v. THE S.S. "HWA LUNG" OWNERS & ORS.

[F.C. (Lee Hun Hoe Ag. L.P., Ali Ag. C.J. (Malaya) and Raja Azlan Shah F.J.) January 14, 1977]

[Penang — Federal Court Civil Appeal No. 98 of 1976]

Shipping Law — Admiralty — Procedure — Action in rem — Whether trial judge can refer matter to Registrar for verification — Action for breach of contract of carriage and breach of duty as bailees — Bill of Lading — Goods delivered to consignees — Whether shippers of goods can bring action under bill of lading — English R.S.C., O. 13, r. 13; O. 56 r. 1 — R. S. C., 1957 O. 13 r. 13; O. 56 r. 1.

The appellants had shipped certain goods on board the S.S. *Hwa Lung* under a bill of lading. Appellants were the holders and indorsees of the bill of lading. The goods were not delivered in Sudan in accordance with the bill of lading. The appellants claimed that the respondents were negligent and/or in breach of the contract of service and of their duty as bailees to deliver the goods in good order. Service of the writ was effected on the ship. No appearance was entered and the appellants applied for judgment. The learned trial judge referred the matter to the Registrar for verification. The Registrar held an inquiry and found that the appellants had not proved their rights to make the claim. The appellants appealed.

Held, allowing the appeal: (1) under Order 13, rule 13 of the Rules of the Supreme Court the learned judge had to decide for himself on the claim first before considering whether or not there should be a reference to the Registrar:

(2) as there was privity of contract between the appellants and the respondents, the appellants were entitled to bring the action and recover the value of the cargo from the respondents;

(3) in default of appearance in this case, judgment should have been entered for the defendants before a reference to the Registrar for assessment of quantum of damages could be made.

Cases referred to:-

(1) *A/B Karlshamms Oljefabriker & Anor.* v. *Monarch Steamship Co. Ltd.* 82 Ll.L.R. 137, 157.

(2) *Wilkinson* v. *Liverpool and Glasgow Selvage Association (the Fremantle)* [1954] 2 Lloyd's Rep. 20.

(3) *The Titia* (1891) 7 Asp. Mar. Law Cas 32; (1891) 64 L.T. 148.

(4) *The Immacolata Concezione* 50 L.T. Rep. N.S. 539: 9 P.D. 37: 5 Asp. Mar. Law Cas. 208.

(5) *The Albazero* [1975] 3 All E.R. 21, 23.

(6) *Dunlop* v. *Lambert* (1839) 6 Cl. & Fin. 600.

(7) *Blamchard* v. *Puge* (1857) 74 Mass. 281, 295.

(8) *Joseph* v. *Knox* (1813) 3 Camp. 320.

(9) *Davis and Jordan* v. *James* (1770) 5 Barr. 2680.

FEDERAL COURT.

C. Arul for the appellants.

Respondents not appearing.

Lee Hun Hoe C.J. (Borneo) & Ag. L.P.: This is an appeal against the dismissal by the learned judge of a motion for judgment in an admiralty action *in rem*. The main ground of appeal is that the learned judge failed to decide on liability and was wrong to refer the question of liability to the Registrar.

Appellants are general merchants carrying on business in Kuala Lumpur. They shipped 37,323 pieces of untreated Kempas Sleepers with ends clamped with metal plate connected on the vessel s.s. "Hwa Lung" under a bill of lading. These sleepers were delivered on board in good order and condition at Port Kelang to Sudan. Appellants were the holders and indorsees of the bill of lading. They claimed that respondents were negligent and/or in breach of contract of carriage and in breach of their duty as bailees in failing to deliver the sleepers in the same good order and condition but had converted the same causing appellants to suffer loss and damage.

Service of the writ was effected by placing the original writ for a short time on the main mast of s.s. "Hwa Lung" then lying at the Port of Penang on August 4, 1975. The statement of claim was filed on May 5, 1976. Appellants claimed for $808,702.87 being the cost of the sleepers ($796,577.32) and inpection fees ($12,125.55). Respondents did not enter appearance. A certificate of non-appearance was duly filed on May 20, 1976. On the same day by a notice of motion and supported by an affidavit verifying the facts appellants applied for an order that judgment be entered for appellant with costs. The learned judge was unable to decide on the motion whether the claim was well-founded or not. So, he referred the matter to the Registrar for verification in accordance with accepted English admiralty procedure which is followed here. See 0.13 r.13.

On June 8, 1976 the Registrar held an inquiry and found that appellants had not proved their rights to make the claim as the Registrar held that unless the original bill of lading had been produced it could not be ascertained whether appellants were still the holders of the said bill. He relied on *A/B Karlshamns Oljefabriker & Anor.* v. *Monarch Steamship Co. Ltd.*(1) where the House of Lords held that "the rights transferred under the bills of lading were all such as might flow from the contract *ab initio* and the various supervening events." He also held that appellants had parted with the goods on shipment to someone at Port Sudan. Having so found he could not ascertain the damages. The learned judge upheld the decision of the Registrar.

The main question here is whether the Registrar has jurisdiction to decide on liability. Our courts follow English admiralty procedure as closely as possible. O.13 r.13 of the 1957 Annual Practice reads as follows: —

"13. In Admiralty actions *in rem*, upon default of appearance, if, when the action comes before him, the judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim with or without a reference *to the Admiralty Registrar or to the Admiralty Registrar assisted by merchants*, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into court, or may make such order as he shall think just."

O.13 r.13 of our Rules of the Supreme Court is almost word for word the same except that instead of using the words above italicised we use "under the provisions of Order 56."

The contention of appellants is that although the learned judge has power to refer to the Registrar for assessment of quantum he could not refer to the Registrar for judgment. Another contention is that the Registrar has no power to appoint one, Albert Lim, as assessor to assist the court. The latter con-

tention can be disposed of simply by referring to O.56 r.1 which provides that: —

"1. This Order shall apply to references by the court or a judge or by agreement of reference to the Registrar, whether the reference be to the Registrar alone or to the Registrar assisted by one or more merchants or other assessor."

This is the same as the English O.56 r.1 except that the latter refers to "Admiralty Registrar". In view of this provision and acquiescence of the learned judge appellants' contention has no merit.

Roscoe's Admiralty Practice, 4th Edition, pages 391 and 392 commenting on O.56 r.1 states that: —

"The chief subjects of references are now the assessment of damages in actions of collision, sometimes of claims in wages, necessaries, and co-ownership actions and on bottomry bonds and mortgages. The exception to this general rule is, that where the amount in dispute is so small that the further expense to the parties caused by a reference should be avoided, the court will itself assess the damages: *The Edéonore*, Br. & L. 185... Questions of law are not usually referred: *The Ocean Wave* 1846) 10 Jur. 506.

In default actions a reference cannot be held until the court has pronounced for the claim: *The Titia* (1891) 7 Asp. 32."

At page 1213 of the 1957 *Annual Practice* commenting on the same order it is stated that: —

"A reference is ordered to assess the damages done by or to a ship, or the amounts due in claims for wages or necessaries, or on mortgages or bottomry bonds, and generally in all cases where matters relating to the assessment of damages or of account are in dispute.

In a default action *in rem* the Admiralty Division will not before judgment refer plaintiff's claim to the Registrar for assessment (*The Titia* (1891) 64 L.T. 148)."

The Registrar rejected Exhibit B (which is a certified copy of an invoice dated May 12, 1976) as being a unilateral declaration of the appellants and would be of no assistance. When the motion was restored for hearing the learned judge stated that as the Registrar had found that damages had not been proved he could see no reason to interfere with the findings and was unable to give judgment on the claim. Accordingly, he dismissed the claim with costs. Appellants submitted the learned judge was wrong. They referred to *Roscoe's* Admiralty Practice, 4th Edition, page 394, particularly the passage which reads: —

"A claim by a cargo owner is also usually verified by an affidavit. Such affidavit may, if the claim is put forward by underwriters, as it frequently is, be made by them in limitation actions, and should state that the goods were insured with the claimants, and that they have paid for a total loss. The affidavit should also verify the claim by substantiating its main points, more especially the market value of the goods. If damages are not claimed on that basis, which is the proper one, because it is impossible or too expensive, the invoice value of the goods may be claimed, and a reasonable merchant's profit, which ranges from 2½ to 10 per cent, will, according to the circumstances of the voyage, be allowed."

In *Wilkinson* v. *Liverpool & Glasgow Salvage Association* (*The "Fremantle"*)[2] the Practice Notes reads: —

"There is no rule which requires all questions of damages to be referred to the Registrar. In the absence of the need to call additional evidence in proof of damage, it may be desirable, to avoid further costs, that damages should be assessed by the judge at the trial, and it is within the power of the Registrar to refuse to award costs to a party who unnecessarily requests a reference."

In that case the widow of the late master of "Fremantle" sued defendants for damages for loss of her husband's life due to negligence. Willmer J., as he then was, gave judgment for plaintiff on the question of liability and directed a reference to the learned Registrar to assess the quantum of damages. In the case of *The Titia*[3] there was a claim by plaintiffs in an action *in rem* for necessaries supplied to the ship Titia. The ship owner had not appeared so the plaintiffs asked for judgment, a sale of the vessel, and a reference to the registrar to ascertain what was due to them. There were other claims against the ship for necessaries and for wages. In granting the motion, Jeune J. in a short judgment, stated that: —

"My attention has already been called by the registrar to the case of *The Immacolata Concezione*.[4] But I notice that that case is eleven years old, and since then no similar order has ever been made. In that case there were a long series of judgments against the defendant ship. Then a late claim — that relied upon by Mr. Aspinall — was put in, and was referred before judgment. But I cannot help thinking that that was done *per incuriam*. However, in the absence of any further precedent for so long a period of time, and it being certainly against principle, I feel bound to refuse this application, and must require these claimants to get judgment before ordering a reference. I may say that I have spoken to the President on this matter, and that he concurs in my views."

On the basis of this authority it seems clear to me that before directing a reference for assessment of quantum of damages the learned judge has to decide for himself on the question of liability. In this case there is an affidavit verifying appellants' claim together with certified copies of bill of lading and invoice. A certificate of non-appearance has also been filed. It is rather unfortunate that the word "verification" was used. I do not think O.13 r.13 envisages this. It might be the learned judge was not satisfied with the affidavit verifying the claim in which case this could easily be remedied by order to file a supplement affidavit. Under O.13 r.13 the learned judge has to decide for himself on the claim first before considering whether or not there should be a reference. In my view judgment should have been entered in favour of appellants. It is for the ship owners to set aside the judgment if they wish to challenge it.

There appears to be some confusion in this case, particularly with regard to the bill of lading. The right to sue does not depend on where the title or risk lay, but on the question of privity of contract. This is made clear in *The Albazero*.[5] There plaintiffs were the time charterers of a vessel "Albracruz" owned by defendants. The "Albazero" was also owned by defendants. The latter was arrested by plaintiffs in respect of their claim against defendants arising out of the total loss of the "Albacruz" together with her cargo of crude oil in the North Atlantic. There is little doubt that if the property or the right to possession were in the plaintiffs they would be entitled to judgment. However, the contention of plaintiffs was that it was irrelevant whether or not they were at the time of loss the owners of the cargo or the persons immediately entitled to its possession. They were entitled to recover the full value of that cargo from defendants. That was even so whether or not at the time title or right to possession or risk had passed to another. Brandon J. held that although neither the property nor the immediate right to possession was on plaintiffs at the time of loss, plaintiffs were,

as a matter of law, entitled to recover the full value of the cargo. The Court of Appeal held that although in general where goods were delivered to a consignee, the consignee, as the owners of the goods, was the proper person to bring an action against the carrier for the loss or damage to the goods, the crucial issue where the right to sue was in question was not where the title and risk lay, but between whom was there privity of contract; the questions of title and risk were only relevant to determine the question of privity. Where the consignor could show that there was a special contract between himself and the carrier whereby the carrier had undertaken to receive the goods from the consignor and to deliver them to the consignee at a particular place, that was sufficient to establish the necessary privity on which the consignor could form an action for substantial damages for loss or damage to the goods without reference to the question whether at the time of the loss or damage, the consignor had the property in, or the right to possession of, the goods, or whether the goods were or were not at his risk. In dismissing the appeal, Roskill L.J. after referring to a series of authorities, stated at page 35 that: —

"I think *Dunlop* v. *Lambert*[6] and the cases referred to in the speech of Lord Cottenham LC justify the submission that the crucial question every time the right to sue was in issue was not where the title or the risk lay but between whom there was privity of contract. Only if there were privity of contract could the plaintiff sue. Questions of title and risk were relevant to determine questions of privity but when once privity was established neither title nor risk was a condition precedent to a successful claim for full damages if breach of contract and resultant loss and damage were proved."

At page 36 he said: —

"Our attention was also drawn to a decision of Shaw C.J. in the Supreme Court of Massachusetts, *Blanchard* v. *Page*,[7] where the learned chief justice seems clearly to have held, following *Joseph* v. *Knox*,[8] that once the bill of lading established privity, the carrier could not defeat the consignor's claim by alleging that the consignor had no interest in the goods and had suffered no loss."

In the same case at page 43 Ormrod L.J. expressed his view that: —

"In my judgment, therefore, the crucial question in this case is the effect of this triad of cases, *Davis and Jordan* v. *James*,[9] *Joseph v. Knox*[8] and *Dunlop* v. *Lambert*,[6] on the measure of damages which the present plaintiffs can recover in this action, assuming that at the date of the loss they had neither property in, nor right to possession of, the goods, nor the risk. *Davis and Jordan* v. *James*[9] is so briefly reported that it throws no light on this point. *Dunlop* v. *Lambert*[6] does not determine it unequivocally because in that case the plaintiff, Dunlop, had replaced at his own expense to the buyer the puncheon of whisky which had been thrown overboard by the shipowner and was attempting to recover his consequential loss. He, therefore, was in a position to prove that he personally had suffered damage. But *Joseph* v. *Knox*[8] is clear authority for the proposition that, where the plaintiff has personally entered into the contract of carriage but has no interest in the goods damaged during the voyage, he can recover from the shipowner in damages an amount equal to the diminution in value of the goods. In that case it was expressly admitted that the property in the goods had passed to the buyer in Surinam and it is clear that the plaintiff was not at risk. Lord Ellenborough said: —

'I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner.'

This decision was expressly approved by the House of Lords in *Dunlop* v. *Lambert*[6] without any reservations, so it is permissible to infer that their Lordships saw nothing anomalous in Joseph and others recovering substantial damages in respect of a loss which did not, in fact, fall on them. This is therefore a strong authority in counsel for the plaintiffs' favour, and, having been approved by the House of Lords, is binding on us unless there are other authorities to the contrary."

In the light of these authorities, I am of the opinion that in default of appearance judgment ought to be entered for defendants before a reference to the Registrar for assessment of quantum of damages could be made. Even assuming that the Registrar could decide on liability he was clearly wrong to insist that appellants as consignor must establish that the property or right to possession of the goods was on appellants. In this case the proper course for this court to do is to give judgment for appellants in default of appearance and to send the case back to a Judge of the High Court for assessment of quantum of damages. I so order.

Appeal allowed with costs.

Ali Ag C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Appeal allowed.

Solicitors: *Chang & Vello.*

BANGKOK BANK LIMITED v. WIEL BROTHERS COTTON INC.

[F.C. (Lee Hun Hoe Ag. L.P., Ali Ag. C.J. (Malaya) and Raja Azlan Shah F.J.) May 19, 1977]

[Penang — Federal Court Civil Appeal Nos. 33 and 34 of 1976]

Practice and Procedure — Judgment of High Court of Justice in England — Execution of judgment — Seizure of cargo alleged to belong to judgment debtor — Writ of Seizure and Sale — Injunction — Intervention by bank claiming to be pledgees of goods — Interpleader proceedings — Security for costs — Proper way of seizing ship or cargo — R.S.C., 1957, O. 5 rr. 16 and 17, O. 9 r. 8, O. 29, O. 41A r. 15, O. 43, r. 3, O. 57 rr. 9 and 12, O. 65 rr. 1 and 6A.

Shipping — Proper way of seizing cargo or ship — Arrest — R.S.C. 1957, O. 5 rr. 16 and 17, and O. 29.

Banking — Bill of lading — Banker's lien — Implied pledge.

In this case Wiel Brothers had obtained awards in England from arbitrators in their favour against Thai Industries. Leave was obtained in England to enforce the awards as judgments or orders to the same effect. Wiel Brothers subsequently applied for registration of the English judgment and for an injunction restraining Thai Industries in respect of a cargo of bales of cotton expected to arrive in Penang. Subsequently they took out a writ of seizure and sale in respect of the bales of cotton. The Bangkok Bank asked for leave to intervene in the proceedings and asked that the bales of cotton be released to them, as they held the relevant bills of lading and the bills of lading were "to the order of Bangkok Bank Ltd." An interpleader summons was subsequently taken out and the learned trial judge considered that that was the best way to decide the ownership of the goods. Pending determination of the interpleader summons he ordered —

(a) that the bank's application to release the goods be unconditionally dismissed;

(b) upon the bank providing a bank guarantee for the sum of $407,000 plus 10% the bales of cotton be released to them;